IN THE

Supreme Court of the United States

October Term, ~~1948~~. 1949

No. ~~588~~. 31

LOUIS A. REILLY, as Postmaster of the City of Newark, in the County of Essex and State of New Jersey,

Petitioner,

v.

JOSEPH J. PINKUS, Trading as American Health Aids Company, Also Known as Energy Food Center,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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TABLE OF CONTENTS OF BRIEF.

TABLE OF CASES CITED.

TABLE OF STATUTES CITED.

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LOUIS A. REILLY, AS POSTMASTER OF THE CITY OF NEWARK, IN THE COUNTY OF ESSEX AND STATE OF NEW JERSEY,

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v.

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Respondent.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (R. 59-62) is reported at 71 F. Supp. 993. The opinion of the United States Court of Appeals for the Third Circuit (R. 68-74) is reported at 170 F. (2d) 786.

JURISDICTION.

The judgment of the Court of Appeals was entered October 25, 1948 (R. 76). The Petition for a Writ of Certiorari was filed February 21, 1949, after this Court granted petitioner an extension of time within which to file his Petition. By order of this Court, dated March 22, 1949, the time for filing respondent's brief in opposition to the Petition for Certiorari was extended to and including May 2, 1949. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 (1).

QUESTION PRESENTED.

Whether the court below properly held that the Postmaster General had no power to issue a fraud order based upon his opinion that a medical remedy sold by respondent was totally ineffective, where there was a difference of opinion as to the effectiveness of the medical remedy.

STATUTES INVOLVED.

The provisions of Revised Statutes 3929, as amended, 39 U. S. C. A. § 259, and Revised Statutes 4041, as amended, 39 U. S. C. A. § 732, are set forth in the appendix, *infra*, pages 25 to 26.

STATEMENT.

Since approximately 1939, respondent had been engaged in the business of operating a health food store in Newark, New Jersey, and like thousands of such stores, sold kelp to customers who asked for it (R.II 125-6).[1] He had an analysis made of kelp, and also analyzed the substance himself while taking a course in advanced organic chemistry at Montclair State Teachers College (R.II 127). At the same school, he took a course in the chemistry of foods (R.II 135). He also did experimental work in the subject at the Kirksville School of Osteopathy in Missouri (R.II 132).

Respondent discussed the value of kelp in association with a recommended diet or menu with various physicians who were friends of his (R.II 128), and conducted a considerable amount of personal research on the relationship of kelp to obesity (R.II 129-130).

Respondent is a college graduate, and in addition, holds the degree of Master of Arts (R.II 137).

Before marketing his product in connection with a weight-reduction plan, respondent obtained letters from various doctors certifying to the effect of the product

1. References to Volume 2 of the Transcript of the Record will thus be indicated by "R.II".

(R.II 141-2). Based on all the information and knowledge he had acquired, respondent then formulated his reducing plan. His plan consists of daily taking a half teaspoonful of Kelp-I-Dine, which is ordinary kelp, and cutting down on food consumption. For the latter purpose, a suggested diet is included with the package of kelp when it is sent to a customer.

Before putting his product on the market, respondent sent a sample of Kelp-I-Dine to the War Production Board for classification (R.II 142). After Kelp-I-Dine was already on the market, he sent the Federal Trade Commission a copy of a radio advertising script in an effort to determine the propriety of his advertising (R.II 145). Later the Food and Drug Administration suggested a small change in his label, to which he immediately agreed (R.II 145).

Since marketing his product, respondent has received thousands of letters from users of Kelp-I-Dine, a great many of whom said that their doctors had approved (R.II 152-3).

The Government placed in evidence examples of advertising inserted by respondent in various magazines, the substance of which is summarized in a Memorandum prepared by a Solicitor of the Post Office Department for the Postmaster General (R. 16-21), and also circulars sent out in response to test inquiries, and various radio scripts which contained much the same type of statements as were contained in the advertisements (R.II 26-7, 30-35).

A chemist employed in the Food and Drug Administration testified that Kelp-I-Dine was kelp and contained four-tenths of a milligram of iodine in each half teaspoonful (R.II 36).

The remaining proof submitted by the Government consisted of the testimony of two physicians, one a physician in the Municipal Hospital in Washington who was also a professor of medicine, and the other a doctor employed by the Food and Drug Administration. Neither of

them had ever made any test of Kelp-I-Dine or kelp. Their testimony was based exclusively upon their general information and upon the chemical analysis already placed in evidence.

In substance, these physicians testified that kelp was valueless in the treatment of obesity, although Dr. Roberts, the first expert for the Government, did admit that iodine which is contained in kelp would have some effect on obesity in certain cases (R.II 82), whereas Dr. Norris, the Food and Drug Administration physician, while recognizing the iodine contained in kelp (R.II 99), denied that it would have any reducing effect in any case (R.II 97-98). Dr. Norris admitted, however, that he had seen statements in certain medical books to the effect that kelp was used in the treatment of obesity (R.II 104). The Government's medical experts also differed from each other as to the caloric content of the diet portion of respondent's reducing plan. Dr. Roberts thought the recommended diet contained between eleven hundred and twelve hundred calories (R.II 74), whereas Dr. Norris was of the opinion that the diet would afford eight hundred or nine hundred to one thousand calories (R.II 90). The difference between these estimates is more than twenty per cent.

Both physicians agreed that by following the recommended diet contained in respondent's reducing plan, a person could lose a certain amount of weight, and possibly as much as three pounds a week or more (R.II 59, 78, 121). However, these experts testified that in certain cases such a loss of weight might be harmful,—where the person involved had one of a number of chronic diseases such as heart disease, diabetes, tuberculosis, etc. (R.II 118).

The respondent introduced the testimony of a private physician who was a general practitioner and an admitting physician of the City Hospital of Newark, New Jersey. In general, his testimony supported the representations made in respondent's advertising as to the effectiveness of the plan in the treatment of obesity (R.II 169-182), although

he admitted that a reduction of weight might be harmful in certain cases, such as where a person has heart trouble (R.II 184-5).

Following the hearings, an Assistant Solicitor of the Post Office Department, who sat as hearing officer, filed a Memorandum for the Postmaster General dated May 3, 1945, in which he stated that kelp was valueless in the treatment of obesity and recommended issuance of a fraud order (R. 14-26). On May 7, 1945, the Postmaster General issued an order forbidding the Postmaster of Newark, New Jersey, to pay any postal money order drawn to the order of American Health Aids Company and Energy Food Center (respondent's trade names) and their officers and agents as such at Newark, New Jersey, directing him to inform the remitter of any such postal money order that payment was forbidden and that the amount would be returned on request, and instructing him to return all letters and other mail matter addressed to the above firms and persons to the senders with the words "Fraudulent: Mail to This Address Returned by Order of Postmaster General" stamped on the outside of the letters.

The facts with regard to the institution of the present litigation by respondent, the issuance by the United States District Court for the District of New Jersey of an injunction restraining enforcement of the fraud order, and the affirmance of the injunction by the United States Court of Appeals for the Third Circuit are adequately set forth in the Petition for a Writ of Certiorari at pages 9-12 and need not be repeated here.

ARGUMENT.

I.

There Is No Justifiable Ground for the Granting of Certiorari in This Case.

This case is governed by **American School of Magnetic Healing v. McAnnulty**, 187 U. S. 94 (1902). Of that there can be no doubt. Both courts below so held.

The **McAnnulty** Case has been cited in over 100 decisions by federal courts, including the Supreme Court, and by various state courts throughout the country, and has never been discredited. There is clearly no reason to review the case at this late date. Even the Government does not contend the case should be overruled,—and yet without such an objective, there is no basis whatever for certiorari.

There could hardly be a less appropriate case than the present one to serve as a vehicle for a review of the rule of the **McAnnulty** Case. For as both courts below have indicated, the Government's case here is supported by virtually no factual evidence, unlike many of the cases originating in other Governmental agencies having concurrent jurisdiction in the realm of medical remedies. The sole testimony upon the basis of which the fraud order in this case was issued was that of two physicians,—one a Government employe,—who, without any factual or experimental data to support them, voiced the opinion that the remedy in question would not accomplish what it was represented to do.

If, under the false guise of the sanctity of administrative findings of fact when supported by substantial evidence, that type of bald opinion is held to justify the exercise by a single Governmental officer of the most plenary power known to our law, then indeed no pharmaceutical company in the country,—whatever its reputation,—may feel secure. For all these companies have some drugs the efficacy of which may be doubtful. And if the Government's contention in this case is sustained, the opinion of a single doctor called as a witness before an Assistant Solicitor of

the Post Office Department may lead to the business demise of any manufacturer of a medical remedy.

We respectfully point out that the Solicitor General of the United States cannot be too confident of the Government's position on the facts of this case. Otherwise he would not have grasped at straws by going outside the Record, and at this late stage of the proceeding, urging the granting of certiorari here **because of the concern of the Federal Trade Commission and the "Pure Food and Drug Administration"** (i. e., the Federal Security Agency)—Petition, p. 18. Actually, as we shall demonstrate neither of these agencies is affected by, or need have any concern about, the decision in this case.

This is a Post Office Department case. It arises out of statutory provisions relating solely to the Post Office Department. It originated in a hearing before an Assistant Solicitor of the Post Office Department, at which two attorneys of that Department presented the Government's case. And it culminated in the issuance of a fraud order by the head of the Post Office Department to the Postmaster of Newark, New Jersey, upon the recommendation of the Assistant Solicitor who heard the case.

What possible excuse can be presented for the Solicitor General's now, for the first time in the long course of this case, going completely outside the Record in an endeavor to pull the Post Office Department's chestnuts out of the fire by urging the granting of certiorari on the request of the Federal Trade Commission and the Food and Drug Administration? Certainly there can be no basis for the "grave concern" of those agencies asserted by the Solicitor General. In the first place, the entire procedure and operation of these agencies, as well as the statutes governing them, are so completely different from those here involved, as developed later in this brief, that this decision has no such far-reaching effect upon them as is impliedly urged in the Petition for a Writ of Certiorari. Perhaps this is most graphically demonstrated by the fact that the only three cases the Solicitor General was able to cite in

which this decision was "utilized" (Petition—footnote 10, page 18) as the apparent basis for the asserted concern of these other two agencies, involve injunctions entered against the enforcement of fraud orders issued by the **Post Office Department.** And the case books amply establish that the other two agencies (Food and Drug Administration and Federal Trade Commission) have not been impeded in any way whatever in the enforcement of their respective enabling laws in the field of medical remedies by the **McAnnulty** decision or by the decision of the court below.

We can only conclude that the sole purpose of the Government's effort to bring other Governmental agencies into this case by the back door is to lend importance to a run-of-the-mill case which cannot justify certiorari standing alone.

II.

American School of Magnetic Healing v. McAnnulty Governs This Case.

In the **McAnnulty** Case, a fraud order was issued against the company and its principal officers on the ground that they were engaged in a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses. Plaintiffs brought a bill for an injunction against enforcement of the fraud order, in which they averred that their business was (187 U. S. at 96) "founded largely and almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof," and that the human race possesses the innate power to largely control and remedy its ills and from this source emanates the plaintiffs' treatment.

There were other allegations in the complaint, all of which were admitted by a demurrer filed by the defendant, a local Postmaster. However, in reversing the lower court and instructing it to grant a temporary injunction with leave to the defendant to answer, Mr. Justice Peckham re-

ferred only to this one admission, that is, that the plaintiffs' business was founded on certain principles (p. 103).

The Supreme Court stated that there was no doubt that the mind exerted some influence upon the physical condition of the body and that it was claimed by some that nature could heal without recourse to medicine. The Court admitted that the extent to which these claims could be borne out by actual experience might be a matter of opinion, but that no one could say accurately to what extent mental condition affects the body. Accordingly, the Court held that no one could say it was a fraud for one person to contend that the mind has an effect upon the body greater than even a vast majority of intelligent people might be willing to admit or believe. The Court concluded (p. 104):

> "* * * **There is no exact standard of absolute truth by which to prove the assertion false and a fraud.** We mean by that to say that the claim of complainants **cannot be the subject of proof as of an ordinary fact;** it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, **such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity.** We may not believe in the efficacy of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. * * *"

The Court went on to give examples of other medical fields in which there were differences of opinion as to the effectiveness of a particular remedy, and at page 105 generalized its view on this subject as follows:

> "* * * **As the effectiveness of almost any particular method of treatment of disease is, to a more or less**

> **extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to fraud. * * *"**

And at page 107, the Court stated:

> "It may perhaps be urged that the instances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all it is in each case opinion only, and not existing facts with which these cases deal. * * * **The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved as matter of fact that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and, as in our opinion, it is used in these statutes."**

In the second portion of its opinion, the Court demonstrated that the rule of inviolability of administrative findings of fact did not apply, because here the Postmaster General had committed an error of law as to his power under the applicable statute.

The applicability of the **McAnnulty** decision to the present case is apparent even from the discussion and purported findings of fact contained in the Solicitor's Memorandum to the Postmaster General, without going any further into the Record in the case. In that Memorandum, it is clearly stated that **"The findings of fact made herein are based only upon the medical testimony of the expert witnesses appearing on behalf of both the Government and the respondent"** (R. 25). The pertinent testimony of these witnesses consisted of their **opinions** as to the therapeutic value of respondent's treatment.

Although the Solicitor in his Memorandum discussed various phases of the testimony, his ultimate finding in support of his recommendation for the issuance of a fraud order was "that kelp [the substance sold by respondent as "Kelp-I-Dine"] is valueless in the treatment of obesity" (R. 23), and that although a purchaser is led to believe by respondent's advertising that his product is valuable for the treatment of obesity, "the medical testimony in this case proves that it is valueless for such purpose" (R. 25). The Solicitor, although he paid little attention to the respondent's medical expert, did mention his testimony that kelp, because of its iodine content, was an "antifat for reducing" and "could be used in the treatment of obesity" (R. 23). The Solicitor admitted that the suggested diet forming part of respondent's advertised reducing plan would effectuate a reduction in weight, but stated that the diet was rigid and severe, and that the reduction would not be accomplished without experiencing hunger and the discomforts and strain thereof (R. 23-25).

Finally, the Solicitor stated that one of the expert medical witnesses for the Government conceded on cross-examination that he had seen statements "in medical dictionaries and other books that kelp was at one time used as a treatment for obesity or was reputed to have some value in the treatment thereof" (R. 25-26).

Thus the Solicitor's Memorandum itself shows that there was a conflict of opinion as to the effectiveness of respondent's remedy. The testimony even more strikingly shows the conflict of opinion. There was no contradiction of the facts that the respondent's remedy was backed by years of study and experimentation, that various doctors had certified to its effectiveness, and that thousands of users had written in to endorse the remedy.

And the Record is just as clear that the Postmaster General's ultimate "finding of fact" in support of the issuance of a fraud order, namely, that respondent's remedy was totally ineffective to accomplish the result for which it was advertised and sold, was merely the **opinion**

of the Postmaster General based upon the somewhat divergent **opinions** of the two medical experts appearing for the Post Office Department.

For these reasons, the Court of Appeals, like the District Court, squarely held that the **McAnnulty** decision governed the disposition of this case. The Court stated (170 F. (2d) at 790-1, R. 73-74):

> "We feel constrained to affirm the judgment of the court below upon the ground that there was no substantial evidence in fact, as distinguished from opinion, to support the findings of the Postmaster General. We would not be understood to say that the value of the plaintiff-appellee's plan and product is not subject to proof as an ordinary fact nor that scientific research and tests may not disclose factually and definitely the efficacy of a particular plan or product. We do say that **the evidence upon which the Postmaster General acted was not factual evidence but solely in the nature of opinion evidence.** If there be ordinary factual evidence of the value of the product and plan here involved it was not placed before the Postmaster General. The proceedings in the Post Office Department do not disclose that any scientific test or research was made with the appellee's product or plan or that the opinions of the medical experts were founded upon the results of any such research or tests. On the contrary, the testimony of the medical experts at the hearing in the Post Office Department seems clearly to have been **founded solely upon professional opinion** based upon a general reading of authoritative textbooks and discussions with other members of the medical profession and indicates that **with respect to the efficacy of appellee's product and plant there are two schools of thought,** albeit one may be outmoded and fallacious in the opinion of a majority of the members of the medical profession."

The Court of Appeals indicated, in the foregoing excerpt from its opinion, that the Post Office Department **might** have been able to prove **factually** that respondent's remedy was valueless for the treatment of obesity. While it might be argued that this view deviates somewhat from the principles enunciated in the **McAnnulty** Case (170 F. (2d) at 791, R. 74), we need not now determine its validity, for there can be no doubt of the complete absence of any **factual** evidence of inefficacy of respondent's remedy in the Record of this case.

It was obviously because of this absence of any **factual** evidence supporting the Department's contention that the Solicitor of the Post Office Department, in his Memorandum for the Postmaster General, based his so-called finding of fact solely upon the medical testimony of the Government's witnesses. For there was no attack at all on the factual, as distinguished from the opinion, aspects of this case. The good faith of respondent, his long and careful study and investigation of the effect of his remedy, his consultation with practicing physicians, his receipt of letters certifying his plan from reputable doctors including the Health Officer of the City of Newark, his receipt of thousands of unsolicited testimonials from users of the remedy, many of whom said their doctors approved,—none of these **facts** was refuted or even challenged.

And respondent has always been open and cooperative even with the Governmental agencies referred to by the Solicitor General in his brief as being gravely concerned over this case. He has had contact with the Federal Trade Commission, to whom he referred a radio script for approval, and with the Food and Drug Administration, which approved his labeling after he promptly made the small change which that agency suggested.

As a matter of fact, throughout these proceedings, respondent was always willing,—and repeatedly so indicated, —to conform his advertising to the wishes or recommendations of the Post Office Department (R.II 162, 214). But that Department's response was that there was no ma-

chinery by which the respondent could be advised as to the proper scope of his advertising, and that "those using the mails do so at their own responsibility and if they violate the law then and only then does the Post Office step in" (R.II 216).

Thus, so far as facts go, respondent's position in this case is unimpeachable. And beyond those facts, the Post Office Department relied for the issuance of a fraud order solely on the **opinion** of its two medical experts as against that of respondent's medical expert and of the conceded statements in certain medical dictionaries. If **American School of Magnetic Healing v. McAnnulty** means anything, it certainly prohibits such action by the Postmaster General.

III.

Leach v. Carlile Distinguished.

In his Petition for Certiorari, petitioner cites only three postal fraud order cases. **Summers v. McCoy**, 163 F. (2d) 1021 (C. C. A. 6th, 1947), cited at page 19 of the Petition, is a one paragraph *per curiam* opinion which does not reveal any of the facts of the case, and the District Court opinion,—if there was one,—is not published. Obviously, petitioner cannot be placing much reliance on this decision. In **Cable v. Walker**, 152 F. (2d) 23 (App. D. C. 1945), cited at page 19 of the Petition, there was practically no conflict of medical opinion involved, since only the plaintiff testified in his own behalf, and he was a layman with no formal training in any subject related to the medical remedy he was marketing. The Circuit Court of Appeals affirmed the denial of an injunction in an opinion less than a page in length. Obviously, that case can have no weight here.

That leaves only **Leach v. Carlile**, 258 U. S. 138 (1922), upon which petitioner principally relied in both courts below, as he does here. Both the District Court (71 F. Supp. at 995, R. 61) and the Court of Appeals (170 F. (2d) at 789-790, R. 71-72) had no hesitation in holding that **Leach v. Carlile** did not govern the present case.

For a proper understanding of **Leach v. Carlile**, it is necessary to consider first the opinion in the Circuit Court of Appeals for the Seventh Circuit (267 Fed. 61), since the facts and the reasoning leading to the decision by the Supreme Court of the United States are there more fully set forth.

Plaintiff advertised a remedy for sexual weaknesses and disorders in men. A fraud order was issued against him and he sought to enjoin its enforcement.

The Circuit Court of Appeals unequivocally recognized that the **McAnnulty** decision would have required the issuance of an injunction against enforcement of the fraud order had it been based solely upon a finding of total ineffectiveness of a medical remedy, as to the effectiveness of which there was a difference of opinion (267 Fed. at 63-64).

However, the Court stated that "any so-called remedy, however meritorious, may in its exploitation become a subject-matter of fraud". Here the advertisement in question contained such grossly extravagant and unwarrantedly optimistic representations, in a letter and a twenty-page booklet, that the findings of the Postmaster General that those representations were fraudulent had to be sustained. Thus, the plaintiff represented, among other things, that his remedy was being recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline, weakened manhood, urinary disorders, lame back, lack of ambition, energy, sleeplessness and rundown system; that the ingredients could be obtained only in plaintiff's product; that the remedy was compounded in one of the largest and best laboratories in the world, etc.

With regard to these and similar assertions, the Court stated (267 Fed. at 67):

> "**The record does not warrant the conclusion that even appellant believed such broad assertions**, nor that he was a physican or a scientist, or had conducted experiments or investigations; and **it does not appear**

that he had basis for any belief whatever on the subject. The assertion of special and peculiar merit for 'organo tablets' over and above, testicular products by any other name or style is wholly without basis in fact. * * *"

Accordingly, we have in the cited case representations which were obviously false and which the administrator could find even the plaintiff did not believe. It was on this ground that the Circuit Court of Appeals affirmed the decree of the District Court denying an injunction against enforcement of the fraud order.

(The good faith of respondent and his belief in the efficacy of his remedy in the present case could not be, and in fact was not, questioned.)

In the Supreme Court of the United States, the distinction between this case and the **McAnnulty** Case was clearly set forth by Mr. Justice Clarke as follows (258 U. S. at 139-140):

"* * * In argument it is contended that the question decided by the Postmaster General was that the substance which the appellant was selling did not produce the results claimed for it, that this, on the record, was a matter of opinion as to which there was conflict of evidence, and that therefore the case is within the scope of *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94. Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that **the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public.** This was a question of fact which the statutes cited committed to the decision of the Postmaster General * * *."

In the present case, the Postmaster General has himself taken the case out of the rule set forth in **Leach v. Carlile** and placed it within the principles of the **McAnnulty** Case by the finding upon which the fraud order was primarily based, namely, that the plaintiff's remedy was **totally ineffective and valueless in the treatment of obesity.**

The Record in this case fully demonstrates the inapplicability of **Leach v. Carlile** and the correctness of the court below in considering the **McAnnulty** decision as binding.[2]

There were only a few specific representations in respondent's advertising that were even considered in the Solicitor's Memorandum to the Postmaster General. The Solicitor's remarks as to these representations could not possibly of themselves form the basis for a fraud order, and the Solicitor nowhere indicated that they entered materially into the ultimate finding of fraud. As we have already pointed out, the fundamental finding which formed the basis for the fraud order was that respondent's product, as distinguished from the suggested diet which was part of his reducing plan, was valueless in the treatment of obesity.

However, we shall demonstrate briefly that the other minor representations considered by the Solicitor were either themselves matters of opinion within the meaning of the **McAnnulty** Case, or were representations of such restricted scope that in no event could they form the basis for application of the principles enunciated in **Leach v. Carlile,** *supra.* As the court below pointed out (170 F. (2d) at 790, R. 72), the Government in the present case did not prove or even charge that respondent's advertisements raised hopes of a cure-all panacea.

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2. Respondent's advertising included a guarantee that "if you find Kelp-I-Dine does not help you lose weight, return the remainder to us and we will refund you money in full" (R. 16). This was plainly an implicit reservation that respondent's plan possibly did not work in all cases and might not be universally beneficial in the treatment of obesity. Such a money back guarantee has been a factor in distinguishing **Leach v. Carlile,** *supra,* and in affirming the issuance of an injunction against the enforcement of a fraud order in a case involving a medical remedy. **Jarvis v. Shackelton Inhaler Co.,** 136 F. (2d) 116 (C. C. A. 6th, 1943).

Among the representations considered by the Solicitor was the statement in a few of respondent's advertisements that followers of his plan would lose excess weight with "no strain" (R. 18), and a statement in a radio script that one could thus lose weight "quickly, easily" (R. 19). The Solicitor referred to testimony in the Record that if a follower of respondent's plan adhered to the recommended diet included with the kelp sent to the user, he would be hungry, since the diet was rigid and severe. From this testimony, the inference seems to be drawn that the representations quoted above were untrue.

As the court below indicated, the severity of the diet recommended by respondent was as much a question of opinion as was the inherent value of kelp in treating obesity (170 F. (2d) at 790, R. 72). At best, the statement that the loss of weight would be easy is a mildly puffing remark. Plainly, different individuals following the same diet would do so with varying degrees of ease and comfort. Accordingly, the reference to this portion of respondent's advertising could not be taken seriously as the basis for a fraud order.

Again, the Solicitor referred to testimony in the Record that treatments for obesity should be individualized and prescribed only after scientific diagnosis (R. 24), and that although a follower of respondent's plan might lose as much as three pounds per week, it would not be harmless, particularly if the diet were not scientifically indicated in his particular case (R. 25). In this discussion, the Solicitor was apparently referring to the use of the words "absolutely harmless" and "safe" in respondent's advertising (R. 16, 18).

Here again, there is no evidence of a misrepresentation of fact which could possibly form the basis of a fraud order. In the first place, it is perfectly clear, and all the evidence shows, that kelp is harmless (R.II 117), and it is obvious that none of the foods in the recommended diet accompanying the kelp was at all harmful. What the physicians who testified for the Government said was not that respondent's

plan was harmful in itself, but that reduction in weight might be harmful to a particular person under certain circumstances. The distinction is a very important one. Obviously, there is virtually no medical remedy sold over the counter, and probably no food (although we do not profess to be experts on the subject) that would not harm some persons under certain conditions, and in certain quantities. If the fact that an advertised commodity might be harmful to some persons under certain conditions were a proper basis for issuance of a fraud order, we submit that as a matter of common knowledge the Court must conclude that fraud orders could be issued against the best known pharmaceutical and food firms in America solely on the ground that their advertising represented that their products were harmless.

Certainly no Court would sustain a fraud order on so flimsy a basis. In any event, whether or not it might be a laudatory aim of the Post Office Department to bar from the privilege of receiving mail anyone selling a product which under any circumstances might be harmful to any person, obviously the postal fraud statutes do not grant the Postmaster General that authority.

IV.

Other Cases Cited by Petitioner Are Totally Inapplicable.

Aside from **Leach v. Carlile** and the other two postal fraud order cases referred to above, petitioner has cited 17 cases on pages 16-17 and 19 of the Petition. Of these, 12 are cases in which the Federal Trade Commission sought enforcement of cease and desist orders, and 5 are cases involving the Food and Drug laws in which libels were filed by the United States for the seizure of condemned products.

A mere reading of those cases indicates clearly that the courts have gone much further in sustaining the administrative action of the agencies there involved than they have in cases arising under the mail fraud statutes. However, on a legal basis, all those cases are distinguishable and have no place in the consideration of the present situation because they involve different statutory powers

permitting broader and more extensive administrative findings, and actually resulting in very different administrative actions than under the postal fraud statutes pursuant to the decision of the **McAnnulty** Case.

Thus, Section 5 of the Act of September 26, 1914, as amended (15 U. S. C. A. § 45), under which cease and desist orders are issued by the Federal Trade Commission, originally provided that the Commission could restrain "unfair methods of competition." The amendment of March 21, 1938 (52 Stat. 11) added "unfair or deceptive acts or practices". It takes little argument to demonstrate that this language,—especially in the field of advertising or labeling in which the cases cited by petitioner fall,—grants the administrator much wider discretion than do the terms "false or fraudulent pretenses, representations, or promises" which form the basis for the exercise of jurisdiction by the Postmaster General under the mail fraud statutes.

The Food and Drug laws are even more strikingly different from the postal fraud statutes, especially since they have been changed from time to time to reflect changing Congressional intent in the light of court decisions, whereas the postal fraud statutes here involved have not been changed in any respect material to the present case since their passage in 1872.

Section 8 of the Act of June 30, 1906 (34 Stat. 771, 21 U. S. C. A. § 9) provided, *inter alia*, that the term "misbranding" should apply to all drugs or articles of food, the package or label of which bears any statement regarding such article, or the ingredients or substances contained therein, "which shall be false or misleading in any particular", and then went on to provide that a drug should be deemed to be misbranded if it was an imitation of another article or if the package failed to bear a statement of the quantity or proportion of certain named ingredients (21 U. S. C. A. § 10, par. 1 and 2).

In **United States v. Johnson**, 221 U. S. 488 (1911), this Court held that the foregoing provisions were aimed not

at all false or misleading statements in connection with drugs but only at such as determine the identity of the drug, possibly including its strength, quality and purity. Accordingly, statements as to the effectiveness of a remedy to cure cancer were held not within the proscription of the Act.

In 1912, the Act was amended (Act of Aug. 23, 1912, 37 Stat. 416), to add as a ground for finding that a drug was misbranded the condition that "its package or label shall bear or contain any statement * * * regarding the curative or therapeutic effect of such article * * * which is false and fraudulent."

Thereafter, in **Seven Cases of Eckman's Alterative v. United States of America**, 239 U. S. 510 (1916), cited in the Petition at page 19, this Court sustained a libel under the amendment of 1912 on the ground of false statements as to the curative effects of a drug. However, the Court confirmed the fact that by use of the words "false and fraudulent", "Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners", and that an "intent to deceive * * * must be established" (p. 517). In that case, the Court found that the allegations of the libel sufficiently satisfied the foregoing requirements since it was averred that the statements as to actual and future cures were contrary to fact. The Court pointed out that one who represents a drug as a cure **"when he knows it is not"** must be held to have had a fraudulent purpose. Obviously, the latter comment would have no application to a case such as the present one where there has never been any question of the respondent's good faith, nor any averment or finding to the contrary.

Subsequently, in the new Federal Food, Drug, and Cosmetic Act of June 25, 1938 (52 Stat. 1040, 21 U. S. C. A., Sup., §§ 301 et seq.), it has been provided clearly and unequivocally that a drug or device shall be deemed to be misbranded, *inter alia*, "if its labeling is false or mislead-

ing in any particular". There follow many additional instances in which misbranding may be found to exist. Thus the coverage of the Act has been materially extended. See **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410, 420 (C. C. A. 9th, 1948).

Even under the broadened provisions of the latter Act, in presenting cases on libels for misbranding or mislabeling of drugs, the Government in many cases in recent years has actually made elaborate and comprehensive tests of the remedies in question, both in the laboratory and under field conditions.[3]

And in the cases cited by petitioner involving the Food and Drug laws which have not already been referred to herein, there was either no question of conflicting medical opinion involved (**Goodwin v. United States**, 2 F. (2d) 200 (C. C. A. 6th, 1924), Petition, p. 19), or the defendant questioned the Government's allegations as to only one of many false representations, any one of which was sufficient to sustain the libel (**United States v. One Device, etc.**, 160 F. (2d) 194 (C. C. A. 10th, 1947), Petition, p. 19).

Accordingly, it is clear that none of the cases cited by petitioner in which enforcement of the Food and Drug laws was involved are either pertinent or conflict with the **McAnnulty** decision. In fact, in none of them is any doubt cast upon the validity of the **McAnnulty** Case.

In a larger sense, however, the reason for the difference in the approach of the courts to the Federal Trade Commission cases and also to the Food and Drug Administration cases, as contrasted with the postal fraud cases, lies

3. See, *e. g.*, **United States v. 7 Jugs, Etc., of Dr. Salisbury's Rakos**, 53 F. Supp. 746 (D. Minn. 1944), cited at pages 17 and 19 of the Petition. In this case, the Court said, at page 758, "Under the law as it now exists, before a court is warranted in submitting the false or misleading qualities of an assertion of effectiveness to a jury to decide, it must be satisfied that something more is involved than mere differences of opinion between schools or practitioners." See also **Research Laboratories, Inc. v. United States**, 167 F. (2d) 410 (C. C. A. 9th, 1948), page 19 of Petition. In the latter case, the Court, at page 414, called specific attention to the difference between the meager technical facilities for the determination of medical questions possessed by the Postmaster General and the almost unlimited professional resources available to the agency which carries on investigations in the enforcement of the Federal Food, Drug, and Cosmetic Act.

in the difference in the permissible sanctions or remedies available to the respective administrative agencies. Under the Federal Trade Commission Act, the Commission may issue a cease and desist order against a method, an act, or a practice. Thus, if a person advertises his product in a manner deemed by the Federal Trade Commission to be unfair or deceptive, the Commission will order him to cease advertising in that manner. Normally, the order will refer specifically to certain words or phrases in the advertisement which the advertiser is required to excise. If the Court of Appeals, under the statutory review procedure provided in the Act, enforces the order of the Commission, the offender is rarely, if ever, put out of business. He need only conform his advertising with the order, and he is then generally free to continue to transact business. See **Irwin v. Federal Trade Commission**, 143 F. (2d) 316 (C. C. A. 8th, 1944).

In cases arising under the Food and Drug laws, the Government normally proceeds by a libel in a federal court to seize the offending product or device. There the court action is the primary action and not merely a review of an administrative decision. The defendant is protected by the general rule requiring a decision on the preponderance of the evidence, and also by his right to a trial by jury.

In fraud order cases, however, not only is the order issued upon the authority of a single administrative official and upon the recommendation of a subordinate in his department, but, more importantly, the order, if enforced, necessarily puts the offender out of business. It is difficult to conceive of the modern business that can exist without the use of the mails. Even if it could, it would have little good will left when its regular mail customers or correspondents of any kind received from the Post Office the letter which they had addressed to that business with the word "Fraudulent" emblazoned on the envelope.

Thus we return once more to **American School of Magnetic Healing v. McAnnulty**, *supra*. All of petitioner's efforts in both courts below to get around the effect of that

decision have been of no avail. We have shown why. The **McAnnulty** decision clearly covers the facts of the present case, and no other decision cited by petitioner here or below does so. The principle of the **McAnnulty** decision, as applied by the Court of Appeals, is a salutary restriction upon the unparalleled administrative power which the Postmaster General has sought to exercise in this case.

It is obvious, from a mere reading of a few of the Federal Trade Commission and Food and Drug Administration decisions in the field of medical remedies, that those agencies have not been and will not be retarded in their enforcement programs by the **McAnnulty** Case or by the decision of the Court of Appeals in this case. If the Postmaster General is retarded by either decision, it is only in a field which he has been forbidden to occupy since 1902, with the apparent sanction of the Congress, which, while broadening the scope of the enforcement powers of Governmental agencies under other statutes encompassing fraudulent or misleading medical remedies, has done nothing to widen the scope of the mail fraud statutes since 1872.

CONCLUSION.

No possible basis for certiorari exists here and none has been presented. The decision of the court below is clearly correct and no conflict of decisions is presented. It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX.

REVISED STATUTES § 3929, AS AMENDED, 39 U. S. C. A. § 259.

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by mail to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

REVISED STATUTES § 4041, AS AMENDED 39 U. S. C. A. § 732.

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders.

This shall not authorize any person to open any letter not addressed to himself.

The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way.